Amalan Tepat Sdn Bhd v Kubang Media Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO MT1–22–123 OF 2003
LOW HOP BING J
30 OCTOBER 2003

Civil Procedure — Injunction — Application for — Whether there were bona fide issues to be tried — Whether justice of case was with plaintiff — Whether balance of convenience favoured plaintiff

The plaintiff applied for an inter partes injunction to restrain the defendant from trespassing onto the plaintiff's land and removing three billboard advertisements, ('the billboards') which had been erected on plaintiff's land. The plaintiff appointed agents to enter into contracts for the purpose of erecting billboards. One of the agents entered into agreements with ING Insurance Bhd and Hakudodo (M) Sdn Bhd. The Alor Gajah District Council (now Municipal Council) served notices on the plaintiff's agents to remove the billboards. Itwas the plaintiff's belief that the defendant was appointed concessionaires for the Municipal Council to erect the billboards and that the said notices were issued by the Municipal Council at the instance of the defendant. The plaintiff claimed that they would be liable for breach of contract and that the status quo should be maintained.

Held, allowing the plaintiff's application:

(1) The functions of a judge, hearing an application for inter partes interlocutory injuction are that he should ask himself whether from the facts there was a bona fide issue to be tried, he must consider where the justice of the case lies and to see what party the balance of convenience favours (see para 12); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.

(2) The defendant had no proprietary right, interest or licence over the said land to enable or permit the defendant to enter or proceed to the plaintiff's land. Whether or not the defendant's intended entry to the plaintiff's land for the purpose of removing the billboards would constitute the tort of trespass is clearly a bona fide serious issue to be tried (see para 14).

(3) The second issue was where the justice of the case lies. The billboards were erected on the plaintiff's land and there were on-going binding contracts between the plaintiff and its clients in relation to the use of the plaintiff's land for the purposes of the erection of the billboards. The removal of the billboards would in all probabilities result in breaches of the said contracts. The billboards should be to allowed to remain, as more harm would be caused to the plaintiff than to the defendant by their removal (see para 15).

(3) In view of the fact that the billboards have already been erected, the balance of convenience was in favour of the plaintiff to allow the status quo to be maintained (see para 16).

[Bahasa Malaysia summary

Plaintif memohon satu injunksi inter partes untuk menghalang defendan daripada masuk ke dalam tanah plaintif dan memindahkan tiga papan iklan ('papan-papan iklan itu') yang telah didirikan di tanah plaintif. Plaintif telah melantik agen-agen untuk memasukki perjanjian dengan tujuan untuk mendirikan papan iklan. Satu daripada agen itu telah masuk perjanjian dengan ING Insurance Bhd dan Hakudodo (M) Sdn Bhd. Majlis Daerah Alor Gajah (sekarang Majlis Perbandaran) telah menyampaikan notis keatas agen-agen plaintif untuk memindahkan papan-papan iklan itu. Plaintif percaya bahawa defendan telah dilantik sebagai pemegang konsesi untuk Majlis Perbandaran untuk mendirikan papan-papan iklan dan notis-notis itu telah dikeluarkan oleh Majlis Perbandaran pada permintaan defendan. Plaintif menyatakan bahawa plaintif akan bertanggungjawab untuk pelanggaran perjanjian dan status quo patut dikekalkan.

Diputuskan, membenarkan permohonan plaintif:

(1) Fungsi-fungsi hakim yang mendengar permohonan untuk injunksi interlokutari inter partes adalah bahawa beliau patut menyoal dirinya sama ada terdapat isu-isu bona fide untuk dibicarakan pada fakta, beliau mesti menimbangkan di mana keadilan kes itu jatuh dan mesti melihat parti yang mana imbangan kemudahan memihak (lihat perenggan 12); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.

(2) Defendan tidak mempunyai hak tuan punya, kepentingan atau lesen di atas tanah itu untuk membolehkan atau membenarkan defendan masuk atau terus ke dalam tanah plaintif. Sama ada kemasukan yang dirancang oleh defendan ke atas tanah plaintif untuk memindahkan papan-papan iklan adalah tort pencerobohan adalah isu bona fide untuk dibicarakan (lihat perenggan 14).

(3) Isu kedua adalah di mana keadilan kes itu jatuh. Papan-papan iklan itu telah didirikan pada tanah plaintif dan terdapat perjanjian-perjanjian berterusan di antara plaintif dan klien plaintif berkenaan penggunaan tanah plantif untuk mendirikan papan-papan iklan itu. Pemindahan papan-papan iklan itu besar kemungkinan, akan menyebabkan pelanggaran perjanjian-perjanjian itu. Papan-papan iklan itu patut dibenarkan diatas tanah plaintif kerana plaintif akan mengalami lebih kesusahan berbanding dengan defendan (lihat perenggan 15).

(4) Memandangkan bahawa papan-papan iklan telah didirikan, imbangan kemudahan memihak kepada plaintif untuk mengekalkan status quo (lihat perenggan 16).]

Notes

For cases on applications for interlocutory injunctions, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2472–2477.

Cases referred to

Interkol (M) Sdn Bhd v Bandar Utama City Promenade Sdn Bhd & Anor [1999] 5 CLJ 376 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (folld)
Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd [2003] 1 MLJ 130 (refd)
Teng Meow Chong v Chia Ngim Fong & Anor [1991] 3 MLJ 452 (refd)

Legislation referred to

Rules of the High Court 1980 O 34
Business Registration Act [Sing]

Lee Choon Hei (Lim Chong Hock & Co) for the plaintiff.
KK Nga (Ngeh & Co) for the defendant.

Low Hop Bing J:

Application

[1] This is the plaintiff's application in encl (5) for an inter partes injunction to restrain the defendant from trespassing onto the plaintiff's land and removing three billboard advertisements, (collectively referred to as 'the billboards') which had been erected on plaintiff's land held under PT 1669, 82 and 83, all in the mukim of Pegoh, district of Alor Gajah (collectively referred to as 'the land'), with costs in the cause.

Factual background

[2] The plaintiff, the registered owner of the land, had appointed Eureka Outdoor Sdn Bhd and Gotcha Sdn Bhd as agents and representatives to enter into contracts with others for the purpose of erecting billboards thereon.

[3] On 15 August 2002, Gotcha Sdn Bhd entered into an agreement with ING Insurance Bhd to display the ING Insurance Bhd billboard on the land for one year beginning 15 August 2002 at sites MGT 003 and MGT 004, at a media rental of RM17,000 per year per site along the A Famosa Resort at Km 216.4 of the North South Highway.

[4] On 28 October 2002, the Alor Gajah District Council (now Municipal Council) served Notice No 08710 on Eureka Outdoor Sdn Bhd to remove the billboards at Km 216.7, 218.6, and 2202.4 within 14 days from that date. It seems to me that these billboards were different from the said ING Insurance Bhd billboard.

[5] On 10 June 2003, Gotcha Sdn Bhd entered into another agreement with Hakudodo (M) Sdn Bhd to display the 'Honda' billboard on the land for two years from 1 June 2003 to 31 May 2005 at a media rental of RM70,000 per year exclusive of electricity and other charges, with an option to renew for one year. This billboard is located along the same Highway, near the WaterWorld Theme Park (south bound).

[6] On 18 July 2003, the Municipal Council served Notice No 08239 on ING Insurance Bhd to remove the billboard within 14 days thereof.

[7] It was the plaintiff's belief that the defendant was appointed the concessionarie for the Municipal Council to erect billboards and that the said notices were issued by the Municipal Council at the instance of the defendant but the Municipal Council is not a party to the suit herein.

Submission for plaintiff

[8] Mr Lee Choon Hei, learned counsel for the plaintiff, submitted that the grant of injunction would not prejudice the defendant. He added that if the billboards were to be removed before the expiry dates of the agreement between the plaintiff and its clients, the plaintiff would be liable for breaches of contract, and that the status quo should be maintained.

Contention for defendant

[9] So far as is relevant to the instant inter partes application, Mr KK Nga, learned counsel for the defendant, contended that on 7 August 2003, the plaintiff's agent, ie Gotcha Sdn Bhd paid a compound imposed by the Municipal Council.

[10] It was stressed that the plaintiff has failed to prove that the defendant has removed the billboard, citing *Interkol (M) Sdn Bhd v Bandar Utama City Promenade Sdn Bhd & Anor* [1999] 5 CLJ 376, in support thereof. It was also argued that there was no bona fide issued to be tried, and *Teng Meow Chong v Chia Ngim Fong & Anor* [1991] 3 MLJ 452 was cited in support thereof.

[11] Another stand taken for the defendant is that the plaintiff's damages if any can be compensated in monetary terms, relying on *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 MLJ 130.

Decision of the court

[12] The functions of a judge, hearing an application for inter partes interlocutory injunction such as the instant application, have been succinctly stated by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 195–196 as follows:

(1) ask himself whether the totality of the facts presented before him disclosed a bona fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and decide whether they are serious enough to

merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[13] Applying the aforesaid principles, I shall now examine and consider the totality of the facts as alluded to above.

[14] It is to be observed immediately that the plaintiff's application is for, inter alia, an injunction to restrain the defendant from trespassing onto the plaintiff's land and removing the billboards. The defendant does not occupy, possess or own the land, of which the plaintiff is the registered owner. The defendant has no proprietary right, interest or licence over the said land to enable or permit the defendant to enter or proceed to the plaintiff's land. Whether or not the defendant's intended entry to the plaintiff's land for the purpose of removing the billboards would constitute the tort of trespass is clearly a bona fide serious issue to be tried. In the circumstances, I should move on to the next step of my inquiry.

[15] This brings me to the consideration of the second issue as to where the justice of the case lies. The billboards have already been erected on the plaintiff's land and there were on-going binding contracts between the plaintiff and its clients in relation to the use of the plaintiff's land for the purposes of the erection of the billboards. The removal of the billboards would in all probabilities result in breaches of the said contracts. It appears to me that the practical realities of the case are and should be to allow the billboards to remain, as more harm would be caused to the plaintiff than to the defendant by their removal.

[16] The third and final issue for me to consider is that the remedy is discretionary in nature and is intended to produce a just result between the date of the instant application and the trial proper, and to maintain the status quo. This issue largely concerns a balance of convenience. Being a discretionary remedy, the grant or refusal of an inter partes interlocutory injunction must be determined by reference to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case. In view of the fact that the billboards have already been erected, I hold that the balance of convenience is in favour of the plaintiff to allow the status quo to be maintained and that an early hearing date ought to be given to resolve the suit between the plaintiff and the defendant.

[17] Numerous authorities have been cited for the defendant. I shall now analyze them in order to arrive at a conclusion as to their support for the defendant's submission.

[18] *Interkol (M) Sdn Bhd* concerns facts which are entirely different from those in the instant application, as the plaintiff was the tenant of the defendant, the landlord, seeking to restrain the landlord from entering the landlord's own premises when the plaintiff has defaulted in the payment of rent under two tenancy agreements. Naturally, I dismissed with costs the plaintiff's application for inter partes interlocutory injunction.

[19] In *Teng Meow Chong* it was construed by the Singapore High Court that the nature and effect of the arrangement between the plaintiff and the first defendant was either one under which the plaintiff became the manager of the business while the proprietary interest in the business remained vested in the first defendant, or, alternatively as one whereby the plaintiff became de facto the sole proprietor of the business taking it over entirely from the first defendant. No return was filed with the Registry of Businesses reflecting the arrangement entered into and the business continued to be registered in the name of the first defendant, in which case, there was an infringement of the provisions of the Singapore Business Registration Act. Thean J refused the plaintiff's motion for continuation of the ex parte injunction and granted the defendants' motion seeking an interlocutory injunction restraining the plaintiff from entering and continuing in occupation of the premises. It seems obvious to me that the facts are clearly distinguishable from those in the instant application.

[20] In my view, *Pekeliling Triangle* appears to militate against the defendant before me, as the facts there revealed that there was a contract between the plaintiff and the defendant for the construction of a commercial and apartment complex. The plaintiff failed to meet the target date for completion and several extensions of time had been given. The first defendant alleged default on the part of the plaintiff. Although the plaintiff carried out remedial works, the first and second defendants were not satisfied. Subsequdntly, the third defendant under the purported authority of the first defendant entered the building site with uniformed guards, some of whom were armed with shotguns. The plaintiff filed an application for injunction to restrain the defendants from, inter alia, entering the project site without the plaintiff's written consent. The learned High Court judge granted the injunction to the plaintiff but the injunction was set aside by the Court of Appeal. In the application before me, there was no contractual relationship between the plaintiff and the defendant, and so *Pekeliling Triangle* could afford no support for the defendant's contention.

[21] On the above grounds, I allow the plaintiff's application and grant an order in terms of encl (5).

[22] Further, in the interest of justice, as alluded to above, an early date should be fixed for the hearing of the main suit herein. In the circumstances, I direct the plaintiff to file an application for case management under O 34

of the Rules of the High Court 1980, on or before 30 December 2003 in order to facilitate further directions to be given thereon, so that an early date can be fixed for the hearing of the main suit herein.

Plaintiff's application allowed.

Reported by Chew Phye Ken